APPENDIX E

[Filed June 23, 2000]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT E. KENNEDY, Petitioner, v. **CAL A. TERHUNE,** Respondent.	Case No. 99-CV-2505-BTM (CGA) **REPORT AND RECOMMENDATION**

I

INTRODUCTION

Petitioner Robert E. Kennedy, a California state prisoner proceeding *pro se* and *in forma pauper*, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction for selling a substance in lieu of a controlled substance (Cal. Health and Saf. Code § 11355) (SCD116399). Petitioner raises eight grounds for relief: (1) that the trial court violated Petitioner's right to equal protection by refusing to provide him a copy of the transcript of his first trial; (2) that the trial court violated Petitioner's right to represent himself at his second trial by refusing to provide a copy of the transcript of his first trial; (3) that the trial court misinstructed the jury on the elements of the charged offense; (4) that the trial court violated Petitioner's Sixth and Fourteenth Amendment rights by failing

to exclude certain prejudicial witness testimony; (5) that the prosecutor committed misconduct by eliciting certain prejudicial testimony from certain witnesses; (6) that trial counsel provided ineffective assistance by failing to pursue a reduced sentence; (7) that California's three-strikes law violates the Eight Amendment's prohibition of cruel and unusual punishment; and (8) that California's three-strikes law is unconstitutionally vague and violates the Ex Post Facto Clause of the U.S. Constitution.

II

STATEMENT OF FACTS[1]

On the afternoon of October 17, 1995, Police Detective Leroy McDowell was working an undercover narcotics operation in an area known for rock cocaine sales. McDowell saw Petitioner and another individual, Randall Tucker, across the street. McDowell made eye contact with Petitioner and nodded his head to indicate that he was asking if Petitioner was selling a controlled substance. Petitioner gestured for McDowell to cross the street.

McDowell approached the two men and asked, "Are you serving?", meaning in street terminology "are you selling a controlled substance?" Tucker responded, "What?" McDowell asked the question again, and Tucker responded, "What do you want?" McDowell said that he wanted "2-0," which in street terminology means $20 of rock cocaine or another controlled substance. Tucker asked, "2-0 of what?" and McDowell repeated, "[a] 2-0."

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1. The facts are taken from the opinion of the California Court of Appeal, Fourth Appellate District, filed September 8, 1998.

Petitioner asked for money, and McDowell took a prerecorded $20 bill from his pocket and gave it to Petitioner. Petitioner put the bill in his pocket and said to Tucker, "Give it to him, cuz." Tucker walked over to a nearby fence, picked up a piece of a paper bag, and handed it to McDowell. Inside the bag were pieces of an off-white, rock-like substance.

McDowell told Tucker that it was not enough and asked him to give some of the money back. Petitioner told McDowell to come back later. Tucker asked if McDowell was a police officer, and McDowell walked away.

Police arrested Petitioner and Tucker. In Petitioner's pocket, by found a $20 bill with numbers which previously had been recorded. The bag contained .08 grams of a noncontrolled substance.

Tucker testified that he and Petitioner had been in the area all day, and earlier had been contacted and patted down by police. Tucker further testified that later that day he saw McDowell standing across the street, and that McDowell said "2-0" several times. Tucker testified that he said, "No," and shook h is head, but that McDowell crossed the street and again asked for a 2-0.

Tucker testified that no drugs were mentioned, but that he noticed McDowell had money in his hand. McDowell handed the money to Tucker and because McDowell was "pushing too much," Tucker walked over to a dirt area, picked up a piece of a bag, and gave it to McDowell. Tucker testified that he did not know what McDowell wanted.

III

PROCEDURAL HISTORY

In an information filed by the District Attorney of San Diego County on November 5, 1995, Petitioner was charged with selling a substance in lieu of a controlled narcotic substance (Cal. Health and Saf. Code § 11355). The District Attorney further alleged that Petitioner had two no-probation prior convictions, two prison prior convictions, and two serious or violent felony convictions (Cal. Pen. Code §§ 1203, subd. (e)(4), 667.5, subd. (b), and 667, subds. (b) through (i), 1170.12), based upon his 1985 conviction for voluntary manslaughter. Clerk's Trnascript ("CT") 18-20.

Petitioner's jury trial began on February 27, 1996. On March 7, 1996, the jury deadlocked and the court declared a mistrial. II Clerk's Transcript ("II CT") 210-224. Petitioner's second trial began on October 25, 1996, and concluded with a verdict of guilty on October 31, 1996. In a bifurcated hearing conducted on November 1, 1996, the court found each prior conviction allegation to be true. II CT 248-49. The trial court struck Petitioner's two prior convictions, pursuant to Cal. Pen. Code § 667.5(b)[2/], and sentenced Petitioner to a state prison term of twenty-five years to life pursuant to Cal. Pen. Code §§ 667 (e)(2) and 1170.12(c)(2). CT 204; II CT 253.

The California Court of Appeal affirmed Petitioner's conviction on September 8, 1998, and the California Supreme Court denied Petitioner's petition for review on December 16, 1998.

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2. § 667.5(b) provides, *inter alia*, that "where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony . . . ."

Petitioner filed a present petition on November 26, 1999. On January 26, 2000, Responded filed an Answer which addressed the first four claims of Petitioner's present petition. Petitioner's filed a Traverse which pointed out that Respondent's Answer failed to address claims five through eight of the present petition. Responded requested, and the Court granted, leave to file a Supplemental Answer addressing the previously overlooked claims. On April 4, 2000, Respondent filed a Supplemental Answer, and on April 27, 2000 and May 5, 2000, respectively, Petitioner filed Supplemental Traverses.

IV

DISCUSSION

A. Legal Standard

Title 28, United States code, § 2254(a), sets forth the scope of review for a section 2254 petition for writ of habeas corpus:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in *violation of the Constitution or laws or treaties of the United States.*

28 U.S.C. § 2254(a) (West 1994) (emphasis added). See *Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir. 1991); *Manhalt v. Reed*, 847 F.2d 576, 579 (9th Circ. 1988).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) "worked substantial changes to the law of habeas corpus." *Moore v. Calderon*, 108 F.3d 261, 263 (9th Cir. 1997). Amended 28 U.S.C. § 2254(d) now reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not bwe granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (West Supp. 1999).

Section 2254(d)(1) now "explicitly identifies only the Supreme Court as the font of 'clearly established' rules." *Id.* This means "[a] state court decision may not be overturned on habeas review, for example, because of a conflict with Ninth Circuit-based law . . . ." *Moore*, 108 F.3d at 264. "[A] writ may issue only when the state court decision is 'contrary to, or involved an unreasonable application of,' an authoritative decision of the Supreme Court." *Id.*; *see Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996).

The Ninth Circuit has not required, however, that "clearly established law" involve the "identifical factual situation" as the case at bar. *See Houston v. Roe*, 177 F.3d 901, 906 (9th Cir. 1999) (finding that for a petitioner to prevail on federal habeas "the Supreme Court need not have addressed a factually identical case, § 2254 (d) only requires that the Supreme Court clearly determine the law"); *Kramer*, 167 F.3d at 498.

Under the AEDPA this Court performs a two step inquiry. First, this Court must identify what, if any, "clearly established federal law" governs each issue presented in the petitioner. *Williams v. Taylor*, 120 S. Ct. 1495, 1505 (2000); *see also Canales v. Roe*, 151 F.3d 1226, 1228-29 (9th Cir. 1998) (stating that the court of appeals must review de novo "the determination of what is 'clearly established Federal law, as determined by the [United States] Supreme Court'") (quotation omitted). Second, fi clearly established federal law exists, this Court must decide whether the California Supreme Court's decision was contrary to, or constituted an unreasonable application of, that clearly established law. *Williams*, 120 S. Ct. at 1505. Ninth Circuit caselaw provides "persuasive authority" for purposes of determining what law is "clearly established" or whether the state court decision is an "unreasonable application" of Supreme Court law. *see Duhaime v. Ducharme*, 200 F.3d 597 (9th Cir. 2000).

In *Williams v. Taylor*, the Supreme Court defined the terms "contrary to" and "unreasonable application" as used in § 2254(d). Specifically, the court stated:

> Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 120 S. Ct. at 1523 In *Van Tran v. Lindsey*, 2000 WL 622070 (9th Cir. May 16, 2000), the Ninth Circuit shed further light on the meaning of "unreasonable application" of clearly

established federal law by looking to the doctrine of "clear error." The court held that:

> [U]nder AEDPA we must reverse a state court's decision as involving an 'unreasonable application' of clearly established federal law when our independent review of the legal questions does not merely allow us ultimately to conclude that the petitioner has the better of two reasonable legal arguments, but rate leaves us with a 'firm conviction' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous – in other words that clear error occurred.

Id. at *7.

AEDPA also requires deference to state court findings of fact. Under § 2254(e)(1), federal courts must "give great deference to the state court's factual findings." *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Circ. 1997) (en banc). As amended § 2254(e)(1) provides: "[A] determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C.A. § 2254(e)(1) (West Supp. 1999). The petitioner has "the burden or rebutting the presumption of correctness by clear and convincing evidence." *Id.*

B. Petitioner's Contentions

1. Failure of Trial Court to Provide Petitioner With a Transcript of His First Trial

As mentioned above, Petitioner's first trial resulted in a mistrial after the jury was unable to reach a verdict. II CT 222. After the court declared a mistrial, defense counsel Roseline Feral requested that the court order a complete transcript of the first trial for the purpose of preparing for the subsequent retrial. Reporter's Augmented Trial Transcript on Appeal ("RAT") 177.

The court suggested that counsel and the prosecutor attempt to resolve the case before ordering that a transcript be prepared. The court also noted that Petitioner was entitled to a transcript of only trial testimony. RAT 177. Apparently believing that she would be representing Petitioner on retrial, defense counsel did not object to the court ordering only the trial testimony transcript. Reporter's Transcript dated September 16, 1996, p. 5-6. The court subsequently ordered a transcript of only the trial testimony. II CT 227.

On September 16, 1996, the trial court granted Petitioenr's request to proceed in *pro per* and appointed advisory counsel to assist him at trial. Reporter's Transcript dated September 16, 1996, p. 7-8. Ten days later, Petitioner requested a complete copy of his firs trial transcript arguing that he needed a fult transcript of all motion hearings, opening statements, and closing argument in order to adequately prepare for his self-representation on retrial. Transcript of September 26 and October 26, 1996 Motion Hearings ("MT") 4-6. The court denied Petitioner's request. MT 6.

a. Equal Protection

Petitioner contends that the trial court violated his right to equal protection when it refused to provide him with a complete trial transcript of his first trial. Petitioner maintains that without the benefit of the entire trial transcript, including all motions, opening statements and final argument, he was not able to fully prepare for his retrial.[3/]

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3. Respondent first contends that this claim fails to present a federal question, but rather, merely alleges a violation of state law. In support of this contention, Respondent notes that the California Court of Appeal evaluated Petitioner's claim based upon California state law. Respondent maintains that "Petitioner has not asserted his claim in any federal context which entitles him to relief" and that "Petitioner's citation to general federal principles does not suffice to pose a federal question for the

The Supreme Court has stated that "the state must, as a matter or equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Griffin v. Illinois*, 351 U.S. 12 (1956). Although the exact contours of that principle have not been defined, in *Britt v. North Carolina*, 404 U.S. 226 (1971), the Supreme Court held that "the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." *Britt*, 404 U.S. at 227. The Court identified two factors which are relevant to the determination of such need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability or alternative devices which would fulfill the same functions of the transcript. *See Id.* In discussing the first factor, the Supreme Court noted that the value of a transcript of a mistrial can ordinarily be assumed based upon its value as a discovery device in preparation for a retrial and as a tool during trial for impeachment of prosecution witnesses. *See Id.* at 228.

There is no dispute that Petitioner was entitled to at least some portion of the transcript of his first trial. Indeed, the trial court recognized Petitioner's constitutional right to a transcript and provided him with a transcript of all testimony from his first trial. The issue is whether clearly established Supreme Court law requires that the State have provided Petitioner with a

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state court to resolve." Answer, p. 9.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." *Estelle v. McGuire*, 501 U.S. 62, 68(1991). Habeas relief is not available for an alleged error *in* the interpretation or application of state law. *See Id.* at 67-68. In both the present petition and in state court, Petitioner maintains that the first trial violated the Equal Protection Clause of the U.S. Constitution. Accordingly, the Court finds that Petitioner has presented a federal question.

complete trial transcript, including all motion hearings, opening statements, and closing arguments.

As noted by the state appellate court, the trial court provided Petitioner with a complete transcript of the trial testimony. Thus, the state appellate court concluded that Petitioner had available all those portions of the transcript which might have been necessary to impeach witnesses or to rebut evidence at the retrial. *See People v. Kennedy*, No. D027718, unpublished slip op. at 6.

This Court finds that the state appellate court's reasoning was not an unreasonable application or, nor contrary to, clearly established Supreme Court law as set forth in *Britt*. *See e.g., Mayer v. City of Chicago*, 404 U.S. 189 (1979) (explaining, in the context of a request for a trial transcript for the purpose of an appeal, that the trial court need provide only a record of sufficient completeness to permit proper consideration of one's claims rather than a complete verbatim transcript); *Williams v. Leeke*, 444 S. Supp. 229, 232 (D.S.C. 1976) (holding that *Britt* does not require that a trial court provide an indigent criminal defendant with a transcript of arguments to the jury, i.e. opening statements and closing arguments).[4/]

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4. The court notes that Petitioner did not explain to the trial court, nor in his present petition, why he needed the additional portions of the trial transcript in order to prepare for his defense at his retrial. Although the Supreme Court has stated than indigent criminal defendant need not demonstrate particularized need in order to be entitled to a transcript of prior proceedings, *see Britt*, 404 U.S. at 225, Petitioner has failed to articular any reason other than that he generally needed the materials to prepare for retrial. To the extent that *Britt* held that the courts may ordinarily assume an indent criminal defendant's need for a transcript of a mistrial in order to prepare for retrial, as discussed above, this Court finds that the trial court satisfied any such need by providing Petitioner with a complete transcript of the trial testimony. *See Britt*, 404 U.S. at 228.

Moreover, Petitioner has not alleged that the denial of his request for a transcript of opening statements, closing arguments, and motion hearings prejudiced him in any way. Thus, even assuming that the trial court erred in failing to provide petitioner with the entire transcript of the first trial, the Court finds such error harmless beyond a reasonable doubt. *See United States v. Rosales-Lopez*, 617 F.2d 1349, 1356 (9th Cir. 1980) (finding the application of an erroneous legal standard to a *Britt* claim harmless beyond a reasonable doubt because Petitioner did not demonstrate prejudice resulting from the trial court's refusal to provide a transcript of a suppression hearing); *accord United States ex rel. Moore v. People of the State of Illinois*, 577 F.2d 411 (7th Cir. 1978) (finding that error in the failure to provide a transcript of a preliminary hearing was harmless beyond a reasonable doubt); *United States ex rel. Cadogan v. LaVallee*, 428 F.2d 165 (2d Cir. 1970) (same). Petitioner has not demonstrated that the California Court of Appeal's decision was contrary to, or an unreasonable application of clearly established Supreme Court law. Petitioner is therefore not entitled to habeas relief on this claim.

b. Right to Self Representation

Petitioner also contends that the trial court's refusal to provide him with a copy of the complete transcript of his first trial caused him to forfeit his right to represent himself under *Faretta v. California*, 422 U.S. 806, 835 (1975), and consequently forced him to accept representation by appointed counsel at the retrial.

As discussed above, Petitioner initially exercised his right under *Faretta* and requested that the trial court permit him to represent himself during his retrial. However, for reasons that are not clear from the record, Petitioner subsequently requested that the trial court appoint counsel to represent him. Although Petitioner now claims that his decision to relinquish his right to self representation was motivated by the trial court's refusal to

provide him with additional portions of the trial transcript, the record does not support Petitioner's contention. As noted by the state appellate court, Petitioner provided no reason to the trial court when he requested appointment of counsel, and the record does not otherwise reveal Petitioner's motive for doing so.

Accordingly, Petitioner has not demonstrated that his decision to give up his right to self representation was involuntary. Nor has Petitioner demonstrated that any of the trial court actions influenced his decision to request appointment of counsel. Petitioner has failed to demonstrate that the California Court of Appeal's decision was contrary to, or an unreasonable application of clearly established Supreme Court law. Petitioner is therefore not entitled to habeas relief on this claim.

2. Jury Instruction

Petitioner contends that the trial court erred in instructing the jury that the crime of sale of a substance in lieu of a controlled substance is a general intent crime.

At the conclusion of Petitioner's retrial, the prosecutor, defense counsel, and the court discussed which jury instructions would be given. Defense counsel lodged an objection to CALJIC No. 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State). In response, the prosecutor stated that they would not need the instruction because the crime was one of general intent. Defense counsel acknowledged, "That's true," and the court clarified that neither attorney wanted the instruction. II RT 138-139. Later, without comment from either side, the court told counsel that it would give CALJIC No. 3.30 (Concurrence of Act and General Criminal Intent).

As discussed above, this Court's review is limited to determining whether the trial court's decision was contrary to, or involved an unreasonable application of, clearly established

federal law as determined by the United States Supreme Court. The Supreme Court's clearly established law with respect to claims of jury instruction error is set forth in *Estelle v. McGuire*, 502 U.S. 62 (1991). In *Estelle*, the Court held that a federal court may not grant habeas relief merely because an instruction was allegedly incorrect under state law. Rather, error in instructing the jury warrants habeas relief only when "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 71(quoting *Cupp v. Naughten*, 414 U.S. 141 (1973)).

The state appellate court, relying on state law, found that the trial court had appropriately instructed the jury that selling a substance in lieu of a controlled narcotic substance in violation of Cal. Health & Saf. Code § 11355 is a general intent rather than specific intent crime. *See People v. Lechlinski*, 60 Cal. 3d 766, 768-69 (1976) (holding that *selling* of a substance in lieu of a controlled substance is a general intent crime, whereas *offering* a substance in lieu of a controlled substance is a specific intent crime). Petitioner has not demonstrated that the jury instruction was incorrect under state law. Although Petitioner asserts that the trial court's "failure to instruct the jury that it must find specific intent in order to find guilt violates the federal constitution," Petitioner cites no authority to support this claim. Petitioner has not demonstrated that the California Court of Appeal's decision was contrary to, or an unreasonable application of clearly established Supreme Court law. Petitioner is therefore not entitled to habeas relief on this claim.

3. Evidence That Petitioner's Alleged Accomplice Was Convicted of the Offense For Which Petitioner Was On Trial

Petitioner contends that the trial court violated his Sixth and Fourteenth Amendment rights "by allowing the prosecutor to mislead and manipulate the jury with false information that was

highly prejudicial of witness' [sic] alleged conviction of the same offense. Petition at 9.

During the defense case, Petitioner's alleged accomplice, Randall Tucker, testified contrary to the testimony of Dettective McDowell. II RT 112-118. Tucker denied that Petitioner had said, "give it to him, cuz," when the detective gave him money, denied that McDowell asked whether Petitioner and Tucker were serving, and stated that he had given the piece of bag to the detective to get rid of him. II RT 115-116.

At the close of the prosecutor's cross examination of Tucker, the prosecutor inquired about Tucker's prior convictions, to which he admitted. II RT 133 -34. The prosecutor then requested a sidebar conference and notified the court and defense counsel that she wanted to ask Tucker about his having been convicted of the current offense. II RT 134. Defense counsel objected, noting that such questioning would delay the trial and would be irrelevant. The court clarified that the prosecutor would not be asking about the plea itself, but rather the fact of the conviction. Defense counsel then objected on the ground of California Evidence Code section 352.[5/] The court noted the objection but allowed the question. The prosecutor asked the witness if he had been "convicted of this offense," and Tucker answered affirmatively. II RT 134-35.

Petitioner maintains that Tucker's testimony was misleading because it implied that a jury had found Tucker guilty of the same offense based on the same facts, whereas Tucker had in fact pled guilty to the offense, in exchange for a

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5. Cal. Evid. Code § 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

reduced sentence. Petitioner contends that the trial court's failure to engage in appropriate balancing of the probative value of the testimony against its prejudicial effect deprived Petitioner of his right to a jury trial and the presumption of innocense.

The Supreme Court has stated that a federal court conducting habeas review is "limited in deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle*, 502 U.S. at 68. The Court has further stated that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id.*

To the extent that Petitioner contends that the trial court did not properly balance the probative value of the admitted evidence in relation to its potentially prejudicial effect, Petitioner has not stated a federal claim. *See Id.*; 28 U.S.C. § 2254 (a). To the extent that Petitioner contends that the allegedly erroneous admission of evidence deprived him of his right to a jury trial and presumption of innocence, the Court finds that Petitioner's contention lacks merit.

There is no established Supreme Court law governing the introduction of a co-defendant's guilty plea or conviction of the crime for which a defendant is on trial. However, the Ninth Circuit and several other circuits have held that although a co-defendant's guilty plea or conviction may not be used as substantive evidence of the guilt of those on trial, it may properly be considered by the jury in evaluating witness credibility. *See Baker v. United States*, 393 393 F.2d 604, 614 (9th Cir.), *cert. denied*, 393 U.S. 835 (1968); *see also United States v. Whitehead*, 618 F.2d 523, 529 (4th Cir. 1980); *United States v. Romeros*, 600 F.2d 1104, 1105 (5th Cir. 1979) (per curiam). Thus, admissibility of a plea turns on the purpose for which it is offered.

Here, noting that the prosecutor's questioning was limited to one question pertaining to the fact of Tucker's conviction, the California Court of Appeal found that evidence of guilty plea was permissible to impeach his testimony that he had committed no crime related to the transaction for which Petitioner was on trial. This Court agrees that the questioning did no more than elicit the fact that Tucker pled guilty, and that the evidence was relevant as bearing on Tucker's credibility. *See United States v. Halbert*, 640 F.2d 1000, 1005-06 (9th Cir. 1981) (per curiam). Accordingly, this Court finds that the California Court of Appeal's decision was not contrary to, nor an unreasonable application of clearly established Supreme Court law. *See Williams*, 120 S.Ct. at 1523. Petitioner is therefore not entitled to habeas relief on this claim.

4. Prosecutorial Misconduct

Petitioner contends that he was deprived of his rights under the Sixth and Fourteenth Amendments and his right to due process because the trial court allowed the prosecutor to improperly elicit evidence of Petitioner's gang affiliation and in-custody status. Attachment to Petition, p. 1.

As with improper jury instructions, alleged prosecutorial misconduct warrants federal habeas relief only where it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnely v. DeChristoforo*, 416 U.S. 637, 643 (1974) (internal quotations omitted).

Petitioner maintains that the prosecutor improperly elicited testimony regarding Petitioner's gang affiliation when she asked Detective McDowell to explain the meaning of the Petitioner's words when Petitioner stated: "Give it to him cuz." II RT 40. Detective McDowell explained that the word "cuz" was terminology used by Crip gang members, people who want to

be gang members, or people from one's neighborhood. Petitioner contends that this testimony alerted the jury to the fact that Petitioner was a member of a gang.

Petitioner also contends that the prosecutor improperly elicited information regarding Petitioner's in-custody status when he asked McDowell to identify Petitioner in court, and McDowell responded by identifying Petitioner as "[t]he person at the defense table with a band on his wrist and goldish brown shirt and hair straight back and goatee." I RT 36. Petitioner contends that this testimony alerted the jury to the fact that Petitioner was incarcerated.

The state appellate court rejected Petitioner's claims because he failed to show how he was prejudiced by the alleged references to his gang affiliation and in-custody status. Moreover, the state court found that Petitioner had waived the"gang affiliation" issue by not objecting to the questions when they were asked. *See People v. Kennedy*, No. D022718, unpublished slip op. at 17.

Although the state appellate court did not directly address the issue of whether or not prosecutorial misconduct had occurred, this Court finds that Petitioner has not made a threshold showing of misconduct. Petitioner maintains that Detective McDowell's testimony identified him as a member of a gang, and thereby deprived him of due process. However, a review of the record reveals that McDowell's testimony merely suggested that use by gang members was one of several possible uses of the term"cuz." McDowell's testimony did not identify Petitioner as a member of a gang. Similarly, this Court finds that McDowell's reference to Petitioner's wrist band was open to interpretation by the jury and did not affirmatively identify Petitioner's in-custody status. Thus, Petitioner has not demonstrated that the prosecutor's actions "so infected the trial

with unfairness as to make the resulting conviction a denial of due process." *See Darden*, 477 U.S. at 181.

Even assuming that the prosecutor's questions constituted misconduct, the Court agrees with the state appellate court's finding that Petitioner has not demonstrated how he was prejudiced by the alleged incidents of prosecutorial misconduct. *See Thompson v. Borg*, 74 F.3d 1571, 1577 (9th Cir. 1996) (explaining that allegations of prosecutorial misconduct are subject to harmless error review). Accordingly, Petitioner has not demonstrated that the state appellate court's conclusion was contrary to, or was an unreasonable application of clearly established Supreme Court law. *See Williams*, 120 S. Ct. at 1523. Petitioner therefore is not entitled to habeas relief on this claim.

5. Ineffective Assistance of Counsel

Petitioner contends that he was denied his Sixth Amendment right to competent representation because his trial counsel failed to "investigate and . . . argue a meritorious sentence alternative." Attachment to Petition, p. 2.[6] Petitioner

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6. Petitioner also appears to contend that trial counsel was ineffective because he failed to adequately review the proceedings in the first trial, and that if he had done so, he would have objected to the admission of gang affiliation evidence. Attachment to Petition, p. 2. Respondent maintains that Petitioner has not exhausted this portion of his ineffective assistance of counsel claim in state court. Respondent argues that the entire petition must therefore be dismissed, because it contains both exhausted and unexhausted claims. *See Rose v. Lundy*, 455 U.S. 509 (1982) (holding that failure to exhaust state remedies as to every claim in petition mandates dismissal of entire petition without reaching the merits of any of the claims). In his first supplemental traverse dated April 24, 2000, Petitioner concedes that he has not exhausted this particular claim, and he requests that the Court dismiss the claim from the present petition. Accordingly, the Court recommends dismissal of this portion of Petitioner's ineffective assistance of counsel claim.

maintains that he could have avoided a prison sentence of twenty-five years to life had his counsel requested that the court during sentencing treat his current offense as a misdemeanor rather than a felony.

The Sixth Amendment states in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend VI. The Supreme Court has recognized that the right to counsel necessarily embodies "the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). In order to prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that his counsel's performance at trial was deficient, and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prong requires a showing that functioning as the "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The prejudice prong requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

The state appellate court rejected Petitioner's claim because it could find no basis for concluding that the trial court was not aware of its authority to reduce Petitioner's current offense to a misdemeanor under the three-strikes law. Under California law, trial courts retain the power to reduce a "wobbler" offense (a felony which can statutorily be reduced to a misdemeanor) from a felony to a misdemeanor under the three-strikes law. *See People v. Superior Court (Alvarez)*, 14 Cal. 4th 968, 979 (1997); Cal. Penal Code section 17, subdivision (b).[7/] In deciding whether to reduce a "wobbler" offense from a felony

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7. No one contends that Petitioner's current offense was not eligible for reduction to a misdemeanor pursuant to section 17(b).

to a misdemeanor for purposes of sentencing under the three - strikes law, the trial court was bound to consider the nature and circumstances of Petitioner's current offense, his appreciation of or attitude toward the offense, his criminal past, and concerns for public safety. *See Alvarez*, 14 Cal. 4th at 979. These considerations were addressed in Petitioner's trial counsel's statement in mitigation submitted to the trial court in support of striking one or more of Petitioner's prior convictions, although counsel did not request that the conviction be reduced to a misdemeanor.

This Court agrees with the state appellate court's finding that because Petitioner has not presented any evidence that demonstrates that the trial court was not aware of its inherent authority to reduce Petitioner's current offense to a misdemeanor for purposes of sentencing under the three-strikes law, Petitioner has not demonstrated that his trial counsel's performance was deficient for failing to request that trial court do so. Moreover, Petitioner has pointed to nothing in the record to indicate that the trial court would have imposed a less severe sentence even if Petitioner's trial counsel had requested that the court treat the nature of his offense as a misdemeanor rather than a felony. *See Alvarez*, 14 Cal. 4th 976-78 (explaining that a trial court's decision to reduce a "wobbler" to a misdemeanor pursuant to section 17 (b) is purely discretionary).[8]

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8. Significantly, in deciding whether to strike Petitioner's prior felonies pursuant to § 667(e) (2), the Court considered many of the same factors that it would have considered in deciding whether to reduce Petitioner's current conviction to a misdemeanor under section 17(b). Petitioner has not demonstrated that the trial court, in deciding whether to reduce the nature of the current offense pursuant to § 667.5(b), had reason to vary from its decision not to strike Petitioner's prior convictions pursuant to § 667(e) (2). Moreover, during a recess at Petitioner's trial, there was some discussion between counsel and the trial judge regarding the fact that some of Petitioner's prior convictions had been reduced to misdemeanors pursuant to section 17(b). II RT 88-90. Thus, it appears that the trial court was aware of its authority to reduce the nature of Petitioner's current offense

This Court finds that Petitioner's counsel's failure to request that the trial court exercise its discretion by reducing Petitioner's offense from a felony to a misdemeanor for sentencing did not fall below the objective standard of reasonableness mandated by the Sixth Amendment. *See Strickland*, 466 U.S. at 687-88. Accordingly, Petitioner has not demonstrated that the decision of the California Court of Appeal was contrary to, or was an unreasonable application of clearly established Supreme Court law. *See Williams*, 120 S. Ct. at 1523.

6. Unconstitutionality of Three-Strikes Law

a. Cruel and Unusual Punishment

Petitioner contends that his prison sentence of twenty-five years to life constitutes cruel and unusual punishment in violation of the Eight Amendment because he is being punished more severely than someone who has been convicted of a more serious felony.

In order for Petitioner's argument to prevail, he would have to establish that the current law recognizes a proportionality argument, and that his sentence is such that it is disproportional to the crime committed. "The leading Supreme Court case on the Eighth Amendment's prohibition against cruel and unusual punishment is *Harmelin v. Michigan*, 501 U.S. 957 (1991)." *Bocian v. Godinez*, 101 F.3d 465, 472 (7th Cir. 1996). However, because *Harmelin* was a plurality opinion, it does not provide the lower courts with a clear analytical framework for analyzing Eight Amendment challenges to sentencing under the three-strikes law. In *Harmelin*, two United States Supreme Court Justices opined that there is no proportionality guarantee in the Eighth Amendment (opinion by Justice Scalia, joined by Chief Justice Rehnquist). *See Id.* at 965 ("We conclude from

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pursuant to section 17(b).

this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."). Three Justices, in the concurrence by Justice Kennedy (joined by Justices O'Connor and Souter), concluded that a proportionality guarantee does exist, but only for those sentences that are "grossly disproportionate" to the crime. *See Id.* at 1001 (citing *Solem v. Helm, supra* at 288). Thus, if the plurality position of Justices Scalia and Rehnquist is in the future adopted by a clear majority of the court, Petitioner's argument would clearly fail. If, however, the plurality position of Justices Kennedy, O'Connor and Souter is in the future adopted by a clear majority of the court, then a disproportionality argument, such as the one Petitioner makes in instant petition, might have merit, depending on the circumstances of the case.

Assuming that the Eight Amendment does include a proportionality guarantee, in order "(to) determine whether a sentence 'grossly disproportionate,' we look to *Rummel v. Estelle*, 445 U.S. 263 (1980), as a benchmark." *United States v. Gonzales*, F.3d 928, 943 (5th Cir. 1997). The petitioner in *Rummel* committed three felonies between 1964 and 1973: (1) fraudulent use of a credit card for $80.00; (2) passing a forged check with a face value of $28.36; and (3) obtaining $120.75 under false pretenses. *Rummel* at 286. The court upheld a life sentence under the recidivist statute stating:

> Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.

Id. at 285.

Here, assuming that the Eighth Amendment contains a proportionality guarantee, Petitioner has not demonstrated that

his sentence amounts to cruel and unusual punishment. Although Petitioner's sentence of twenty-five years to life for selling .08 grams of a substance in lieu of a controlled narcotic substance might appear harsh if this were his only offense, Petitioner's status as a recidivist is what makes him eligible for a more severe sentence. Petitioner's sentence was based on his commission of the current felony after having been convicted of at least two prior "serious" or "violent" felonies. *See* Cal. Penal Code § 667(b) ["It is the intent of the Legislature in enacting subdivisions (b) to (I), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."]. Here, Petitioner's first serious or violent prior was a 1982 conviction for forcible rape with a deadly weapon; his second serious or violent prior was a 1985conviction for voluntary manslaughter. I CT 179-88; II CT 262.

Using *Rummel* as the benchmark, and comparing the sentences in *Harmelin* and *Rummel* to the present case, this Court finds Petitioner's sentence under California's Three Strikes Law is not gross disproportionate and therefore cruel and unusual. Accordingly, Petitioner has not "demonstrated that the state appellate court's conclusion was contrary to, or was an unreasonable application of clearly established Supreme Court law. *See Williams*, 120 S. Ct. at 1523. Petitioner therefore not entitled to habeas relief on this claim.

b. Vagueness and Ex Post Facto

Petitioner contends that California's Three-Strikes law is "unconstitutionally vague violating both the state and federal constitutions due process [sic], because it does not state with sufficient clarity whether pre-enactment felony convictions maybe used as strikes to trigger application of the sentencing scheme." Attachment to Petition, p. 4.

The U.S. Supreme Court has stated that "[v]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979). Unless First Amendment freedoms are implicated – and that is not the case here – "a vagueness argument may not rest on hypothetical applications, but must show that the law is vague as applied to the facts of the case at hand .... The test for vagueness is whether the provision fails to give a person of ordinary intelligence fair notice that it would apply to the conduct contemplated." *United States v. Johnson*, 130 F.3d1352 (9th Cir. 1997) (citations omitted).

Petitioner maintains that the three-strikes law is unconstitutionally vague as applied to the facts of his case in that it did not provide him notice that his previous convictions, incurred prior to the enactment of the three-strikes law, could constitute strikes. Although Petitioner does not state with particularity what section of the three-strikes law he contends is unconstitutionally vague, it appears that he is referring to § 667(d)(1), which states, *inter alia:*

> The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) through (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon initial sentencing, converts the felony to a misdemeanor.

Cal. Penal Code § 667(d)(1) (West 2000) (emphasis added).

The state appellate court relied on *People v. Sipe*, 36 Cal. App. 4th 468 (1995) in finding that the three-strikes law survived Petitioner's vagueness challenge. The appellant in *Sipe* argued that the language "upon the date of that prior conviction" meant that only felony convictions incurred after the effective date of the three-strikes law could be considered "strikes". The

California Court of Appeal rejected the appellant's argument stating:

> In focusing solely on the requirement that the determination be made 'upon the date of that prior conviction," [the appellant] ignores the rest of the sentence. In construing a statute, the word must be read in context. The balance of the sentence provides the sentence imposed shall not affect the determination, unless 'the sentence automatically, upon initial sentencing, converts the felony to a misdemeanor.' The statute then sets forth various dispositions that will not affect the felony/misdemeanor determination. Read in context, the 'determination' at issue must be whether the prior conviction 'is a prior felony conviction' rather than a conviction, so subsequent events, such as a reduction to a misdemeanor will not affect its classification as a felony conviction.

Sipe, 36 Cal. App. 4th. at 478 (internal citations omitted).

The *Sipe* court concluded that the language of the statute clearly and unambiguously permits pre-enactment convictions to be used as "strikes". *See id.* This Court agrees with the reasoning in *Sipe* that when viewed in context, the language which Petitioner contends is vague clearly provides that pre-enactment felony convictions can constitute strikes under the three-strikes law. Thus, given the clarity of § 667(d) (1), this Court finds that a repeat offender of ordinary intelligence would have had fair notice that felony convictions incurred prior to the enactment of the three-strikes law could constitute strikes, incurring enhancement of a criminal defendant's sentence for the current offense. Accordingly, Petitioner has not demonstrated that the decision of was an unreasonable application of clearly established Supreme Court law. *See Williams*, 120 S. Ct. at 1523.

To the extent that Petitioner asserts an Ex Post Facto challenge to the three-strikes law, under clearly established Supreme Court law, the application of an enhancement due to a prior conviction is not a violation of the Ex Post Facto Clause. *See McDonald v. Massachusetts*, 180 U.S. 311, 312-313 (1901); *Fong v. United States*, 287 F.2d 525, 526 (9th Cir.) *cert. denied*, 366 U.S. 971 (1961); *see also United States v. Sorenson*, 914 F.2d 173, 174 (9th Cir. 1990) (dismissing ex post facto challenge to enhancement with prior convictions as meritless) *cert. denied*, 498 U.S. 1099 (1991). Enhancement of a sentence based on prior convictions is not a penalty for the prior offense. *See McDonald*, 180 U.S. at 312-313. Rather, the enhancement punishes the repetitive nature of the present offense. *See id.*

Thus, California's use of pre-enactment convictions as "strikes" under the Three Strikes law does not offend federal due process, nor does it violate the Ex Post Facto Clause. Accordingly, Petitioner has not demonstrated that the decision of the California Court of Appeal was contrary to, or was an unreasonable application of clearly established Supreme Court law. *See Williams*, 120 S.Ct. at 1523. Petitioner is therefore not entitled to habeas relief on this claim.

V

CONCLUSION AND RECOMMENDATION

After a thorough review of the record in this matter, the undersigned Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be **DENIED** with prejudice and that judgment be entered accordingly.

This Report and Recommendation is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).

IT IS ORDERED that no later than July 17, 2000, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than July 31, 2000. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Dated: June 22, 2000

/S/
CYNTHIA G. AARON
United States Magistrate Judge